MAKING THE EFFECTIVE LINKS WITHIN THE CLIMATE REGIME COMPLEX: THE 2015 AGREEMENT

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Sandrine Maljean-Dubois, *CNRS and Aix-Marseille University*
Matthieu Wemaëre, *Lawyer, Brussels and Paris*

Climate change is a highly complex policy challenge. Its causes cut across all economic sectors. Solutions require many different kind of policy in energy, infrastructure, finance and innovation, to name just a few. At the international level, the United Nations Framework Convention on Climate Change (UNFCCC) is widely seen as the central pillar of a broader 'regime complex', encompassing a number of formal and informal international policy processes.
Negotiations on a new climate agreement should be concluded under the UNFCCC by the end of 2015. Many countries expect these negotiations to produce a durable and dynamic legal agreement, which can structure climate cooperation in the long-term.
This raises the question: what can the new agreement do in order to better promote effective synergies within the different elements of the climate regime, and to manage potential frictions? This is the subject of this policy brief.

WHY FRAGMENTATION AND IS IT A PROBLEM?

The issue of regime fragmentation has gained more weight in recent times, as researchers and policy makers realise the complexity of climate change, and search for effective solutions. We can highlight four central reasons why the climate regime displays this degree of fragmentation:

• As mentioned above, climate change is a highly complex, multi-sector, multi-scale problem. Addressing it effectively requires coordinated policy responses in many domains; ongoing work by the OECD, for example, assesses the multiple policy response required at the national level from different sectoral policy processes: from energy policy, trade and competition policy, innovation policy, infrastructure planning, and financial regulation. The same principle holds at the international level. An effective response to climate change will inevitably require a complex, multifaceted response, combining the expertise and mandates of different policy processes.

• There has also been in the past a divergence of views between countries and researchers regarding appropriate processes. This has been particular manifest in the debate about multilateral versus mini-lateral approaches to international coordination. Today it is probably fair to say that this conflict is perhaps less fundamental, and that a majority of experts and policy makers see multilateral and mini-lateral as complementary. This can be seen in the so-called Workstream 2 process under the UNFCCC and the Lima-Paris Action Agenda, which aims to catalyse a range of International Cooperative Initiatives. It is therefore being increasingly recognized that the UNFCCC is a core aspect of the global climate regime, but insufficient by itself.

• International law is, by definition, a fragmented regime. Fragmentation arises logically from the principle of 'autonomy of treaties', according to which every treaty is independent of all other treaties. The UNFCCC forms, of itself, already a fairly complex legal regime. The Convention, Kyoto Protocol, and Cancun Accords all represent significant albeit distinct developments of the climate regime. Nonetheless, overall the UNFCCC regime represents a relatively cohesive whole. In the past, it can be argued that the sharing of the workload between the UNFCCC and institutions like the IMO, ICAO, WTO or Montreal Protocol have not been fully synergistic.
It should be noted that fragmentation is not necessarily prejudicial. What matters is the effectiveness of the policy response, and it seems relatively clear that the lack of better coordination has hindered the policy response in the past.

POLICY OPTIONS

International climate change governance consists of a "regime complex" rather than just a single regime of norms and institutions under the 1992 UN Climate Change Convention and the Kyoto Protocol. Orsini, Morin and Young later gave it the more precise and practical meaning of "a network of three or more international regimes that relate to a common subject matter; exhibit overlapping membership; and generate substantive, normative, or operative interactions recognized as potentially problematic whether or not they are essential in identifying regime complexes and analyzing their effects".
As well as the UNFCCC, this complex includes numerous public and private institutions and initiatives which operate at the international, regional, bilateral, national and even subnational level, each with its own focus (for example, expertise with the IPCC, finance, technology, business…) and involving varying levels of commitment. The interactions between these different spheres vary both in their strength, and in whether they are intended or accidental.
The concept of regime complex has the advantage of highlighting what links the different regimes together as much as what divides them. Hence it offers an interesting analytical framework for understanding accurately a complex reality by focusing on the flow of both norms and actors which exist between the different legal and institutional realms. It therefore takes us further forward than the simple, well-established and relatively unhelpful observation that regime fragmentation exists, and towards a greater understanding of the relationships and interactions between these regimes.
Seen from this perspective, the Paris Accord should be viewed as the bedrock of this regime complex; otherwise the Accord and the whole regime complex are likely to be ineffective. To this end, the Accord should aim to fulfil two different but complementary objectives:

- on the one hand, a catalysing role to create a dynamic and contribute to raising the level of ambition in the other regimes that form part of the regime complex:
- on the other hand, to play the leading role in order *to orchestrate* climate governance, to strengthen coherence and ensure complementarity, ensure work is covered correctly and avoid duplication of effort etc.

Among the different tools available to assist in meeting this double objective, there are four which deserve particular consideration in the future Paris Accord.

1. PROMOTING MUTUAL SUPPORTIVENESS

The Accord could include a clause referring to what is called the mutual supportiveness principle between different normative areas such as climate change/business, climate change/investment, climate change/biodiversity, climate change/ozone, climate change/disaster prevention, climate change/human rights etc. The principle requires consideration of whether there are areas of conflict given that the Parties are required to interpret and apply the rules emanating from the two different legal regimes in a way that is mutually compatible. It is therefore a principle that enables the different regimes to be linked and coordinated whilst avoiding a hierarchy.
For instance, a reference to mutual supportiveness in the Paris Accord would be helpful to engage the business community. In terms of its environmental and commercial objectives, the Paris Agreement should not be subservient to international commercial law. More generally, it would be beneficial to promote the principle of mutual supportiveness in the Paris Accord with a fairly general formulation that takes the mutual supportiveness principle out of its usual application specifically to international trade law.
The Paris Accord could be inspired by the relatively balanced formulation contained in the Legal principles adopted in 2014 by the International Law Association. Article 10 entitled "Inter-Relationships" is expressed thus:
1. In order to effectively address climate change and its adverse effects, States shall formulate, elaborate and implement international law relating to climate change in a mutually supportive manner with other relevant international law.
2. States in cooperation with relevant international organizations shall ensure that consideration of climate mitigation and adaptation will be integrated into their law, policies and actions at all relevant levels, as laid out in Article 3.
3. According to Article 8, States shall cooperate with each other to implement the inter-relationship principle in all areas of international law, whenever necessary (…)"
As it specifically relates to a climate vs trade context, an alternative option to the use of the mutual supportiveness principle would be to create a clause allowing for the use of commercial measures to implement the Accord, following the example of the Article 4 of the Montreal Protocol. Such an option would be less respectful but far more effective from a climate point of view. However, having been rejected as a potential part of the Kyoto Protocol, there is little chance of such an option being adopted in Paris. Any such clause would also need to conform to the requirements of the World Trade Organisation.

Given that it represents a compromise, mutual supportiveness should be a more politically acceptable option and would benefit the other areas of international environmental cooperation (in particular on ozone layer protection or biological diversity where there has already been some friction) and also more widely to the trade, investment, law of the sea and human rights domains. The clause proposed by the ILA is particularly interesting because it is balanced in aiming to take into account other areas of law in the drafting and implementation of climate law (§1), it also provides a principle of integration of climate demands into other policy areas at all relevant levels (§2) and provides, if necessary, for cooperation on the implementation of the principle of internormativity (§3). In this way, such a clause could enable secondary legislation (for example, previous COP decisions relating to the Paris Accord) to guide the implementation of the Accord in a direction which takes account of other normative areas in an evolutionary way. Such a clause could also inspire other normative areas to take better account of the relevant targets in the Paris Accord in a spirit of "win-win".

To take the example of biodiversity, procedures and modalities for INDC implementation could be used to authorise the COP to recommend to Parties that they take into account the need to protect biodiversity, with reference to decisions under the Convention on Biological Diversity (CBD) that relate to certain objectives, means or indicators. Combined with the principle of "no backsliding", such an initiative could produce a domino effect on biodiversity conversation (whose positive effects on climate change mitigation and adaptation are already well-known). Clearly, the level of resistance that can be expected from some Parties to such an initiative should not be under-estimated. This resistance originates from a fear that discussions within the CBD could be "contaminated" through the "importation" of difficulties and structural issues from the UNFCCC. It also stems from a fear of losing sovereignty by "importing" concepts and rules that emanate from the UNFCCC, also remembering that some important Parties such as the US are not parties to the CBD. It may also be worth thinking about the need for better coordinated action with the Montreal Protocol on the elimination of HFCs.

2. PROMOTING "STRENGTHENED COOPERATION" INITIATIVES

The idea of "strengthened cooperation" is to enable some Parties in the climate regime to take additional action with others beyond that which is provided for by the regime itself. Such an idea has a precedent in other regimes, such as the EU legal order whereby some EU Member States that wish to continue to work more closely together to do so, while respecting the legal framework of the Union can thus move forward at different speeds and/or towards different goals (Art. 326-328 TFEU). Although that model is not directly replicable in the climate regime, the principle of such enhanced cooperation certainly is.

Importantly, the Convention already provides some basis for strengthened cooperation in Article 7(2)(c), which allows for two or more Parties to the Convention to take additional measures and to request the COP to facilitate the coordination of such measures. The Paris Accord could therefore include a provision allowing Parties to take measures together that fall both under the Convention and/or another regime in furtherance of the Convention's ultimate objective. Such a clause would offer multiple benefits, both by enhancing the implementation of the climate and other international regimes, and by inspiring and providing good examples to other Parties which could in turn result in an acceleration of the global effort under the Convention. Given the difficulty in making substantial progress involving all Parties, enhanced cooperative action could be a key way of enhancing not just the implementation of work under the Convention, but also under other regimes by promoting synergies with the Convention, and thus reducing fragmentation in the realm of international law.

3. SELECTING ONE OR MORE AMBITIOUS TARGETS TO BECOME 'METANORMS' OR OVERARCHING NORMS

The use of meta-norms could play a key role in strengthening the regime complex on international climate change and linking efforts under the UNFCCC with others in the international environmental law arena (for example with the post 2015 Agenda and the Sustainable Development Goals).

From a legal perspective, to be elevated to the status of a "meta-norm", an objective needs to have normative character – to provide a rule that could give rise to legal consequences and be judicially enforced if necessary. 'Sustainable development' at present lacks that normative character and tends to function more as an 'overarching objective' in a policy or 'soft law' sense, and as a procedural tool to integrate economic, environmental and social concerns. However, incorporating a reference to the SDGs in the Paris Accord would be an important first step in affording sustainable development that legal character. It would also assist in linking the work under the Convention with relevant regimes, environmental and other, to the benefit of each of those regimes. Crucially, it would guide Parties' in their implementation of the Paris Accord so that it is consistent with those other regimes, thus enhancing international legal coherence and reducing fragmentation. One option which may be politically acceptable would be to link the SDGs to the climate regime through a specific reference in the Preamble to the Paris Accord. Such preambular text can be significant in influencing the interpretation and implementation of a legal agreement, and this would therefore constitute that important first step in elevating sustainable development to the status of a 'metanorm'.

4. PROMOTING PUBLIC-PRIVATE PARTNERSHIPS

The Paris Accord could promote and inspire public-private partnerships with a view to fulfilling and adding momentum to the action taken thereunder. Such a clause would always be useful, even though the more robust, ambitious and inclusive the Accord is, the less it would be needed. Such a clause could support flexible initiatives, which could compliment more conventional forms of action such as the Climate and Clean Air Coalition or sectoral agreements. Consideration could also be given to including in the Accord measures to support and develop carbon markets – clauses, which do not necessarily need to be set out in detail. This would follow on from paragraph 19 of the Lima Decision CP.20/1, which discusses the "possibilities stemming from higher mitigation potential, including those possibilities with positive secondary effects". The World Summit on Climate organised by the UN Secretary General in September 2014 was very much in this vein.

RECOMMENDED READING

- *ILA Legal Principles Relating to Climate Change Draft Articles (2014),* http://www.ila-hq.org/en/committees/index.cfm/cid/1029
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- Sebastian Oberthur, Antonio G.M. La Vina, Jennifer Morgan, "Getting specific on the 2015 Climate Change Agreement: Suggestions for the Legal Text with an Explanatory Memorandum", WRI ACT2015 Working Paper (May 2015)
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